

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1505

MARSHALL P. SAFIR,

—VS.—

Petitioner,

JUANITA M. KREPS, Individually, and as
Secretary of Commerce, *et al.*

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS
AMERICAN EXPORT LINES, INC., AMERICAN
PRESIDENT LINES, LTD., FARRELL LINES, INC.,
LYKES BROS. STEAMSHIP CO., INC., MOORE-
MCCORMACK LINES, INCORPORATED, PRUDENTIAL
LINES, INC., PSS STEAMSHIP COMPANY, INC. AND
UNITED STATES LINES, INC.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia, entered February 11, 1977, appears at Petitioner's Appendix A, p. 1a.¹

The underlying administrative agency decisions are (a) the initial opinion of the Maritime Subsidy Board ("Board"), *Investigation of Alleged Section 810 Violation*, Docket No. S-243, Pet. App. N, p. 104a, 13 SRR

¹ References to the Appendix submitted by Petitioner are herein referred to as "Pet. App., p. —."

809,² (b) the Board's Final Order on Recoveries, Pet. App. K, p. 76a, 14 SRR 77, and (c) the decision of the Secretary of Commerce ("Secretary") on appeal from the final order of the Board, Pet. App. E, p. 56a, 14 SRR 928.

The order of the United States District Court for the District of Columbia dismissing petitioner's motion for summary judgment and granting the cross motions of the Government and the intervening steamship lines to dismiss petitioner's complaint appears at Pet. App. D, p. 55a.

JURISDICTION

The order of the Court of Appeals was entered February 11, 1977. The petition was filed April 29, 1977. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1970).

STATUTE INVOLVED

Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227 (1970) is set forth in the petition, p. 3.

QUESTIONS PRESENTED¹

1. Whether Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227 imposes an inflexible, nondiscretionary obligation on the part of the Secretary, after a violation of that section has been found, to recover for the government all subsidies earned by and paid to the participating shipping lines under their contracts with the government during the period of a past violation, in this case allegedly amounting to \$227 million.

¹ "SRR" citations are to Pike and Fischer Shipping Regulation Reporter.

² The Court below rejected the contentions of the government and these respondents that Mr. Safir had no standing to seek court review of the action taken by the Secretary. The Solicitor General and these respondents have been granted an extension of time to June 11, 1977, to file a cross-petition to this Court on the standing issue.

2. Whether the first question (which has been decided adversely to Petitioner by two Courts of Appeals and other lower courts, and on which there is no conflict) should be reviewed by this Court at this time, when the decision below remanded the case to the District Court for a fuller review of the agency action and for consideration of undecided issues raised by respondent steamship companies which may have a controlling effect on the litigation.

STATEMENT OF THE CASE

The respondent steamship companies joining in this brief were intervening defendants in the District Court and appellees in the court below. They were, during the periods relevant to this litigation, the holders of operating-differential subsidy contracts with the government under the Merchant Marine Act, 1936, 46 U.S.C. § 1101 *et seq.*, and were members of a steamship conference which, during the eleven month period from March 29, 1965 until February 28, 1966 reduced its rates for the carriage of government military cargo to the level of similar rates adopted by Sapphire Steamship Lines, Inc., (the "Sapphire line") a line in which petitioner was a 50% stockholder. The four "trade lines", American Export, Lykes, Moore-McCormack and United States Lines, operated on the same routes as the Sapphire line; the four "non-trade" lines, American President, Farrell, Prudential and PSS did not compete with the Sapphire line or participate in establishing the reduced rates. Shortly after the rates were equalized the Federal Maritime Commission ("Commission") conducted an investigation of the practices surrounding the carriage of military cargoes generally as a result of which in 1967 it concluded, among other things, that the rate equalization by the conference with the Sapphire line was unfair, the rates being unreasonably low in violation of Section 18(b) (5) of the Shipping Act, 1916 (46 U.S.C. § 814). *Rates on U.S. Government Cargoes*, Docket No. 65-13, 11 FMC 263 (1967).

Based on the findings of the Commission a proceeding (Docket No. S-243) was later commenced by the Board in which Mr. Safir (without the support of the Sapphire line which has settled and released claims against the steamship companies) demanded that the Board order the forfeiture and recovery of all operating and construction subsidy, aggregating \$227 million (Pet. App. p. 206a), paid to the respondent lines during the eleven month period of the rate equalization. That proceeding was founded upon Section 810 of the Merchant Marine Act, 1936 (46 U.S.C. 1227), which provides in relevant part that subsidy shall be withheld by the United States from companies engaging in unfair practices causing damage to other U.S.-flag common carrier steamship companies.

After extensive hearings, the Board decreed that subsidies of \$2,388,443 theretofore paid should be recovered from the "trade lines" and nothing from the "non-trade lines" who, although members of the same steamship conference, did not compete directly with Sapphire and whose violation was merely technical (Pet. App. K, p. 88a-89a). An appeal was taken by all the lines (but not by Mr. Safir) to the Secretary who reduced the forfeitures of the trade lines by about one-half, to \$1,126,341, because of the pressure exercised by the government on the lines to equalize their rates, and affirmed as to the non-trade lines (Pet. App. E, p. 56a).

On cross motions for summary judgment, the District Court denied petitioner's motion to overturn the Secretary's ruling that the recovery of subsidy was discretionary, and granted the cross motions of the government and the intervening steamship lines dismissing petitioner's complaint with prejudice.

The Court below reversed the order of the District Court and remanded the matter for further proceedings

including the decision of other unresolved issues. It held, however, that Section 810 was not mandatory in requiring the Secretary to forfeit all subsidy earned during the eleven month period of the rate equalization.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the courts in their recognition that Section 810 is not mandatory in requiring that 100% of the subsidy earned by and paid to the companies should be recovered after an agency decision holding that that section of the law has been violated in the past. The Second Circuit (per Judge Friendly) so decided in *Safir v. Gibson*, 432 F.2d 137, 145 n. 2, cert. denied, 400 U.S. 850, 27 L.Ed.2d 88 (1970):

Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation, and if so, how much and from whom.

The court below agreed, Pet. App. A, p. 12a, as have other lower courts (*e.g.*, *Safir v. Gulick*, 297 F.Supp. 630 at 643 (E.D.N.Y. 1969)) as well as the Board, the Secretary and the District Court below.

2. Review by this Court is premature in light of the decision of the court below remanding the case to the District Court for further proceedings. The court below suggested that the trial court might, if necessary, remand the record to the Secretary for clarification of his reasoning underlying the reduction of the forfeitures decreed by the Board. Pet. App. at p. 17a.

3. Review is furthermore premature because the court below also suggested that the issues raised by the trade and non-trade lines in separate but related suits brought

by them for review of the final determination of the Secretary be decided by the District Court so that the contentions of all parties not finally disposed of by the District Court might be brought back to the court below for disposition at the same time. Pet. App. A, p. 17a, n. 8. These suits allege that the Secretary misinterpreted and misapplied Section 810 of the Merchant Marine Act, 1936, as a matter of law on the grounds (a) that the evidence was conclusive that Sapphire was not a "common carrier" (but solely a military carrier) and that Section 810 may be invoked to recover subsidy only where the unfair competition is directed at a common carrier (see *Safir v. Gibson*, *supra*, 432 F.2d at 141); (b) assuming that the Sapphire line was a common carrier, it had for the first thirty years after enactment of the 1936 Act been the consistent administrative interpretation that Section 810 of that Act might be invoked only where subsidized lines had unfairly excluded other United States flag common carriers from membership in a conference and the Sapphire line was not excluded from the respondents' conference but rather declined to join;⁴ (c) assuming ice and that Section 810 applies to conduct other than refusal of admission to a conference, nevertheless, the sanctions of Section 810 were designed to operate prospectively only in situations where, as in this case, the alleged violation involved the question of the reasonableness of the level of a rate;⁵ (d) the United States Government, through the military departments, having exercised pressure on the respondent steamship lines to equal-

⁴ *Isbrandtsen Co., Inc. v. American Export Lines, Inc.*, 4 F.M.B./M.A. 442, 448, 453 (1954); *Isbrandtsen Co., Inc. v. American Export Lines, Inc.*, 4 F.M.B./M.A. 772, 784 (appeal dismissed sub nom. *Isbrandtsen Co. v. F.M.B.*, 159 F.Supp. 884 (D.D.C. 1958); *American President Lines, Ltd.-Japan/Saigon Freight Conference*, 6 SRR 57, 60-62 (1965).

⁵ *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717-18 (2d Cir. 1966); *United States v. Pacific Coast European Conference*, 451 F.2d 712 (9th Cir. 1971).

ize their rates with those of the Sapphire line and then having shipped cargo at those reduced rates to its own substantial financial benefit at the expense of the lines, is estopped as a matter of law from appropriating to itself under Section 810 through the Board the subsidies earned by the lines;⁶ and (e) Section 810 is violated only by a party which participates in the conduct prohibited by that provision, and since the non-trade lines did not participate in the illegal rate reductions they cannot even "technically" have violated the statute.

4. The Petitioner has twice before sought to obtain premature review by this Court of the same issue presented in the petition, and certiorari has in each instance been denied. In *Safir, et al. v. Gibson, et al.*, Docket No. 388, October Term 1970, among the questions alleged to be present was whether the Board was under an unconditional mandatory duty to recover all subsidies paid. Certiorari was denied, 400 U.S. 850, 27 L.Ed.2d 88, October 12, 1970 (Mr. Justice Douglas being of the opinion that certiorari should be granted). Again in *Safir v. Blackwell*, Docket No. 73-229, October Term 1973, Mr. Safir sought review of the Second Circuit's denial of his motion in the latter court to set aside the initial Board decision assessing the subsidy forfeitures, contending that Section 810 was mandatory (Pet. App. 96a-103a). Certiorari was denied, 414 U.S. 975, 38 L.Ed.2d 218 and a petition for rehearing was denied, 414 U.S. 1052, 38 L.Ed.2d 340, October 24, 1973.

At the time of the denial of the first and second petitions the government agencies had not taken final action; currently the courts below have not taken final action to review the agency decisions.

⁶ *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970); *Pacific Far East Line, Inc. v. United States*, 394 F.2d 990, 1003 (Ct. Cl. 1968); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970).

CONCLUSION

For the reasons stated the petition should be denied.

Respectfully submitted,

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